

Padilla torture case comes before US Supreme Court

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“It is hard to conceive of a more profound constitutional violation than the torture of a US citizen on US soil,” wrote lawyers for Jose Padilla in a petition filed Monday with the US Supreme Court. A lawsuit brought by Padilla, who was illegally “disappeared,” imprisoned and tortured by the US government for four years, was thrown out by lower courts on the grounds that the courts have no authority to subject the wartime actions of the executive branch to “judicial scrutiny.”

Padilla’s treatment constituted a test case for the incommunicado detention and torture of US citizens by the military without any judicial process. The Padilla case, as much as any other to date, illustrates the disintegration of democracy in the US and the erection of the legal scaffolding of a police state.

According to the precedent set by the Padilla case, federal authorities and the military may unilaterally abduct, imprison and torture a US citizen, in clear violation of the Bill of Rights, without anyone ever being held accountable. If this can be done to one individual, there is nothing in principle preventing the government from doing it to hundreds or thousands or millions of individuals.

On June 2, 2002, Jose Padilla, a US citizen, was declared by then-president George W. Bush to be an “enemy combatant.” On this basis, i.e., the sole say-so of the president, US military personnel seized Padilla from a Chicago jail, where he was incarcerated pursuant to a “material witness” warrant, and transported him to the Consolidated Naval Brig in Charleston, South Carolina, a military prison.

“It would be almost two years before anyone beyond the Brig’s doors heard from Mr. Padilla again,” the petition states. For nearly four years, Padilla was subjected to continuous physical and psychological torture, from which he suffered permanent brain damage.

Padilla’s torture featured the trademark sensory deprivation, sleep prevention, and sadistic round-the-clock abuse associated with Guantanamo, CIA “black sites,” and other torture camps operated by the US government. For ten months, Padilla’s mother was not even informed whether or not he was alive. Padilla’s Supreme Court petition includes a description of his treatment:

“His only human interaction was with interrogators or with guards delivering food through a slot in the door or standing watch when he was allowed to shower. The windows of Mr. Padilla’s cell were blackened. He was alternately subjected to prolonged periods of constant light and complete darkness. He was unable to fulfill his religious obligation to pray five times a day. Removal from his cell entailed additional sensory deprivation, with blackout goggles and sound blocking earphones. All outside information—papers, radio, television—was prohibited, and his Koran was confiscated.

“Mr. Padilla was denied a mattress, blanket, sheet, and pillow, left with only a steel slab upon which to sleep. His efforts at rest were hindered by deliberate banging, glaring artificial light, noxious odors, and extreme temperature variations. Interrogators injected Mr. Padilla with substances represented to be truth serums, shackled him for hours in excruciating “stress” positions, threatened to transfer him to a foreign country or Guantanamo where, he was told, he would be subjected to far worse treatment, and even threatened to kill him.”

In 2007, an expert clinical forensic psychologist determined that there was a “98 percent chance” that Padilla had suffered brain damage as a result of torture during his confinement, and explained that he now exhibits a “strong indication of cognitive impairment.”

The torture and imprisonment of Padilla present the most glaring and obvious violations of the US constitution. The Fifth Amendment on its face provides that no person shall “be deprived of... liberty... without due process of law.” The Eighth Amendment states that “cruel and unusual punishments [shall not be] inflicted.” Most importantly, the right of habeas corpus—the prisoner’s ancient right to challenge his or her confinement before a judge—is guaranteed in Article I of the US constitution. If the prisoner is never able to get into a courtroom in the first place, as was the case with Padilla, then all of the prisoner’s other rights and protections amount to zero.

In Padilla’s case, virtually all of the historic constitutional legal protections associated with the US legal system were flouted: Padilla was never indicted by a grand jury, no warrant was ever issued for his arrest, he was denied his right to a speedy trial, he was denied his right to an attorney, he was not allowed to confront any witnesses against him, he was not proven guilty beyond a reasonable doubt before a jury, and so on. The military simply made Padilla “disappear.”

It was not until January 2006, when a pending Supreme Court case threatened to call into question the illegal treatment of Padilla, that the Bush administration transferred Padilla to a civilian jail and filed criminal charges. In January 2008, Padilla was sentenced to 17 years and four months in prison on charges of “conspiracy” to participate in terrorist acts. An appeals court in 2011 ruled that this sentence was too “lenient.”

To date, no government or military official involved in the illegal imprisonment and torture of Padilla has been held accountable.

In February 2007, Padilla and his mother Estela Lebron brought a lawsuit against top military and executive officials in the Bush administration, including Donald Rumsfeld, John Ashcroft and Paul Wolfowitz, as well as the military officers at the brig where Padilla was held. The case, *Lebron v. Rumsfeld*, directly raises Padilla’s fundamental constitutional rights. For a remedy, Padilla and his mother simply seek a declaration that Padilla’s rights were violated

and damages of one dollar from each of the defendants. The right to sue the federal government for violations of the Constitution has been well established for decades.

A related case filed by Padilla against Bush administration Justice Department official John Yoo, the author of one of the infamous “torture memos” pursuant to which Padilla was tortured, is currently pending in the Ninth Circuit court of appeals. Notably, in that case the Obama administration has intervened on the side of Yoo.

In February 2011, a federal district court summarily threw out Padilla’s lawsuit against Rumsfeld and others. The Fourth Circuit Court of Appeals affirmed the lower court action on the grounds that “deference” had to be shown to the executive branch and the military on matters involving national security. The 39-page Fourth Circuit decision, handed down on January 23 of this year, is an encyclopedia of pseudo-legal doctrines that would appear comfortably in any dictatorship’s law textbooks.

The Fourth Circuit wrote: “Padilla’s complaint seeks quite candidly to have the judiciary review and disapprove sensitive military decisions made after extensive deliberations within the executive branch as to what the law permitted, what national security required, and how best to reconcile competing values. It takes little enough imagination to understand that a judicially devised damages action would expose past executive deliberations affecting sensitive matters of national security to the prospect of searching judicial scrutiny. It would affect future discussions as well, shadowed as they might be by the thought that those involved would face prolonged civil litigation and potential personal liability.” In other words, executive and military officials should be able to go about their business without worrying about whether their actions violate the Constitution.

The Fourth Circuit analysis has the most far-reaching implications. Echoing the “unitary executive theory” adopted by the Bush and Obama administrations, the Fourth Circuit declared that the Constitution “commits responsibility for military governance and the conduct of foreign affairs to the branches most capable of addressing them and most accountable to the people for their choices [i.e., Congress and, especially, the president]. Padilla asks us to intervene in a manner courts have not before seen fit to attempt.” Taken to its logical conclusion, this amounts to an argument that the judiciary should abandon entirely its historic role as a check on executive power, so long as the executive branch cites interests of “national security.”

It should be noted that the Fourth Circuit decision, in common with virtually all rulings that have been handed down in relation to the so-called “war on terror,” ignores the constitutional stipulation that only Congress has the power to declare war and that no such congressional declaration was made in the case of this geographically and duration-wise unlimited “war.”

In the final analysis, the pseudo-legal arguments employed by the Fourth Circuit in the Padilla case correspond closely to fascist jurisprudence.

According to theories developed by Nazi jurist Carl Schmitt in the 1930s, threats to national security can justify a “state of exception,” under which “enemies” are preemptively stripped of all rights and the executive is elevated to a status above the law. In the US, with the phrase “war on terror” substituted for “state of exception” and references made to the president’s “commander-in-chief” and “wartime powers,” legal doctrines have been implemented according to which any person can be branded an “enemy combatant” and thereby stripped of all rights, imprisoned and tortured. Meanwhile, the

president, executive officials, and the military are elevated above the Constitution and the Bill of Rights.

The resemblance of the doctrines developed in the Padilla case to Nazi jurisprudence is not coincidental. In a March 2011 article, Georgetown law professor David J. Luban noted the growing popularity of the theories of Schmitt in conservative legal academic circles, citing “five law review references to Schmitt between 1980 and 1990; 114 between 1990 and 2000; and 420 since 2000, with almost twice as many in the last five years as the previous five.”

Right-wing Senator Lindsey Graham cited the precedent set by the Padilla case in arguing in favor of the National Defense Authorization Act (NDAA) on November 17 of last year. The NDAA, signed by president Obama the following month, expressly grants the president the power to unilaterally imprison any person declared to be an “enemy combatant.”

Addressing the Senate, Graham explained the significance of the Padilla case: “Are you familiar with the Padilla case? That is a federal court case involving an American citizen captured in the United States who was held for several years as an enemy combatant. His case went to the Fourth Circuit. The Fourth Circuit Court of Appeals said: An American citizen can be held by our military as an enemy combatant, even if they are caught in the United States, because once they join the enemy forces, then they present a military threat and their citizenship is not a sort of a get-out-of-jail-free card; that the law of the land is that an American citizen can be held as an enemy combatant. That went to the Fourth Circuit. That, as I speak, is the law of the land.”

In their petition to the Supreme Court, Padilla’s lawyers, including attorneys from the American Civil Liberties Union and the Yale Law School’s International Human Rights Clinic, observed that the case raised nothing less than the basic structure of the American government, including the constitutional system of “checks and balances” designed to limit the powers of the various branches of government. “In short,” they wrote, “this case tests the Judiciary’s commitment to ‘freedom’s first principles’ ... Executive officials have claimed immunity for the torture of a US citizen in South Carolina. In averting its eyes from that misconduct, the court of appeals relegated the defense of a core individual liberty to the political branches alone. Our system of checks and balances cannot tolerate that result.”

Padilla’s Supreme Court petition was filed the month after Attorney General Eric Holder announced the position of the Obama administration, that the president may unilaterally order the assassination of any person, including a US citizen, anywhere in the world, without any kind of judicial process whatsoever.

The votes of a minimum of four of the nine Supreme Court justices is required to grant a petition for the Supreme Court to hear the case, called a “petition for writ of certiorari.” If the petition is granted, the case proceeds to written briefs, oral argument and a decision. If the petition is denied, as approximately 99 percent of petitions are, the decision of the lower court is allowed to stand.



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